Ohio Supreme Court, U.S.
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STANLEY JUDD,

Appellant,

vs.

THE COLUMBUS BAR ASSOCIATION,

Appellee.

[redacted]

[redacted]

[redacted]

[redacted]

No. 260

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

On Appeal from the Supreme Court of Ohio

STANLEY JURUS,

Appellant,

vs.

THE COLUMBUS BAR ASSOCIATION,

Appellee.

MOTION TO DISMISS

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MOTION TO DISMISS

Now comes the Columbus Bar Association, Appellee, in the above entitled case, and moves to dismiss this appeal on the grounds that no jurisdiction attaches for the following reasons:

A) the three questions presented by appellant were not timely or properly raised in the state court proceedings;

B) the three questions presented by appellant are so unsubstantial as to need no further argument.

ARGUMENT

The Questions Presented by Appellant Were Not Timely or Properly Raised in the State Court Proceedings.

Appellant's Jurisdictional Statement is divided into three main categories which are 1) Questions Presented; 2) Statement Of The Case; and 3) The Questions Are Substantial.

Only under the main heading in said Jurisdictional Statement entitled Statement of the Case do we find any reference by Appellant as to when and how the Federal questions were raised. Thus at pages 13 and 14 of said Jurisdictional Statement we find Appellant setting out the objections that were made to the report of the Board of Commissioners. Of these objections the only ones that purport to raise any constitutional question are numbers 4 and 5 which we quote as follows:

4. "That the entire proceedings before the Panel deprived this Respondent of due process."
5. "That the entire proceedings before the Panel were unconstitutional."

The listing of said Objections is then followed by Appellant's statement at page 13 as follows:

> "Appellant submits that at this point the required Federal question was squarely placed before the Supreme Court."

It should be noted here that nowhere in said Objections is there even a direction as to whether the Appellant was referring to the state or Federal Constitution, let alone any degree of preciseness as to the particular Federal question sought to be raised. Here we note this Court's holdings that allegations of a generalized nature as to unconstitutionality have been held to refer to the constitution of the state in question, and further that the Federal question and grounds for same must be called to the state court's attention with precision. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67-68; 49 S. Ct. 61, 73 L. ed. 184; *Bowe v. Scott*, 233 U.S. 658, 664-665, 34 S. Ct. 769, 58 L. ed. 1141.

The only reference to the Constitution of the United States found in the entire state court proceedings is in Appellant's Application for Re-Hearing filed with the Supreme Court of Ohio after its determination. In *Herndon vs. Georgia* (1935), 295 U.S. 441, 79 L. ed. 1530, 55 S. Ct. 794 this Court stated at page 443:

> "The long established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it."

Prior to said Application for Re-Hearing the only reference to any constitution is in counsel's opening statement before the Hearing Panel of the Board of Commissioners, beginning at the last paragraph, 2nd sentence, page 2 of the record from which we quote as follows:

> "I sincerely question the right of this Board to proceed with this proceeding on the ground that under the *constitution of this state* the Industrial Compensation matters are specifically reserved as a legislative matter." (emphasis ours)

Only in Appellant's Jurisdictional Statement filed with this Court, do we find for the first time Federal questions being presented with any particularity or even a semblance of a degree of preciseness.

The questions presented herein were not timely raised nor properly framed in the state court proceedings. *Godchoux Co. v. Estopinal*, 251 U.S. 179, 181, 64 L. ed. 213, 40 S. Ct. 116; *Beck v. Washington* (1961), 369 U.S. 541, 550, 8 L. ed. 2d 98, 82 S. Ct. 955. Further we quote from *Oxley Stave Co. v. Butler County*, 166 U.S. 648 at page 655, 17 S. Ct. 709, 41 L. ed. 1149:

> "* * * the jurisdiction of this court to re-examine the final judgment of the state court cannot arise from mere inference but only from arguments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

Appellant objects to the failure of the Hearing Panel to rule on his Motion to Make Definite and Certain. However, we can finding nothing in the record from which a Federal question in this connection can even be inferred. Further we quote from counsel for Appellant in his opening statement at page 2 of the record as follows:

> "I filed what would be equivalent to a motion to make definite and certain in a civil action or a request for a bill of particulars in a criminal case and it is my understanding that my motion as such was overruled on the ground that the rule did not provide for anything except an answer.

> "I will say that Mr. Justice, this last week, furnished me the names of a number of people who apparently were being called as witnesses and whose names will be, no doubt, involved and we received more yesterday.
> "I might also say that the communication indicated that they are not restricted to those names nor were they required to present all of them, which is surely an understandable ground rule for this proceeding but I wanted to point out to show that there seemed to be limited things which we as the Respondent can learn and can do."

While we believe it is unnecessary, we nonetheless comment that on those matters sought to be made more definite and certain it would, in our opinion, have necessitated a recital of evidentiary material and thus improper pleading in civil practice. We note that at page 11 of Appellant's Jurisdictional Statement comment about Appellee's Demand for Documents prior to trial. Appellant neglects however, to mention that this demand was not even substantially complied with by Appellant prior to trial so it could hardly have been prejudicial.

Finally, in reviewing the opinion of the Supreme Court of Ohio (Appellant's Appendix A) and the Findings of Fact and Recommendation of the Board (Appellant's Appendix B), we note no reference, comment or allusion to a constitutional question, either general or specific.

The Questions Are So Unsubstantial As Not to Need Further Argument.

Before proceeding to review the questions herein presented in the light of their alleged substantiality, we reiterate our position that said questions herein presented by the Appellant were not timely or properly raised in the state court proceedings. For this reason it is our position that the discussion, as hereinafter relating to the unsubstantiality of such questions, can be termed "academic".

Questions 1 and 2

The first two questions presented by Appellant relate directly to the inherent power of the Supreme Court of Ohio to assume original jurisdiction to discipline attorneys and to provide the rules and basis for such discipline.

Certainly there is no question of the inherent power of the Court to discipline attorneys and provide by rule the procedure and basis for such discipline. *Cleveland Bar Association v. Pleasant*, (1958) 167 O.S. 325, 148 NE 2d 493, Cert. den. 358 U.S. 842; *Mahoning County Bar Association v. Franko*, 168 O.S. 17, 151 NE 2d 17, Cert. den. 358 U.S. 932.

As respects legislative enactments which vest power in various courts including the courts of appeal and the common pleas courts as well as the Supreme Court of Ohio, we fail to see where the question of the elimination of the courts of appeal or the common pleas court is at issue here. We are here concerned only with the inherent power of the Supreme Court of Ohio to exercise original jurisdiction in the disciplining of attorneys.

We quote branch 2 of the Syllabus in *Re McBride*, 164 O.S. 419 (1956), 132 NE 2d 113, Cert. den. 351 U.S. 965, at page 419 as follows:

> "The legislative branch may provide by statute standards and qualifications for admission to the bar and methods for the initiation and conduct of proceedings to disbar, suspend or otherwise discipline attorneys for specified causes, but such legislation is to be interpreted as an aid and not as a limitation on the powers of the judicial branch in these respects."

Review of other jurisdictions establish that statutes which provide certain specified grounds for suspension or disbarment do not limit the inherent power of the Court

to suspend or remove attorneys for other causes than those mentioned in the statute. *State v. Mosher*, 128 Iowa 82, 103 NW 105; *Lenihan v. Commonwealth*, 165 Kentucky 93, 176 SW 948; *Re Ebbs*, 150 N.C. 44, 63 SE 190; *Wolfe's Disbarment*, 288 Pa. 331, 135 A 732, 50 ALR 380.

We find Appellant citing the cases of *Konigsberg v. State Bar of California*, 353 U.S. 252, 1 L ed 2d 810, 77 S Ct 722, and *Schware v. Board of Bar Examiners of the State of New Mexico*, 353 U.S. 232, 1 L ed 2d 796, 77 S Ct 752, as presenting the same principle as herein. We fail to see the relevancy of these "admission to the bar" cases. They did not involve persons admitted to practice law and bound by the Canons of Professional Ethics. Nonetheless, can it be said here that there is any substantial question as to the rational connection between the discipline imposed in the instant case and the violation of Canons 27 and 28 of the Canons of Professional Ethics as well as the solicitation of legal employment in violation of *Section 4705.08 of the Revised Code of Ohio* as found by the Board of Commissioners and confirmed by the Supreme Court of Ohio? Additionally it should be pointed out that the entire hearing before a panel of three commissioners was reviewed by the entire Board which was followed by review by the Supreme Court of Ohio.

Appellant objects to what he terms "trial by competitors". Appellant draws a completely unwarranted inference that such trial cannot be objective and Appellant neglects to discuss the review requirements of the full Board of Commissioners as well as the Supreme Court of Ohio. We only point to the many boards and commissions in local, state and Federal government which act as fact finders but whose findings are subject to review as herein.

Comment is made by the Appellant that the Industrial Commission brought no charges of solicitation. This is

totally irrelevant and merits only the comment that it was not nor is it our function to evaluate the policies or enforcement machinery of a state political agency.

Next Appellant comments, apparently inferring criticism, upon the burden of proof in disciplinary cases in Ohio, which is that of a preponderence of the evidence. As Appellant indicates this burden was established in the case of *In Re Lieberman*, 163 O.S. 35. Here again we fail to see the relevancy of Appellant's comments in this regard since apparently his objections are directed at said amended Rule XXVII and here we emphasize that the *Lieberman* case was decided in 1955 which was before the adoption of said amended Rule XXVII.

Due process in disciplinary proceedings requires that the attorney receive notice of such proceedings and opportunity to defend and a hearing and that the proceedings be essentially fair. *Bradley v. Fisher* (US) 13 Wall 335.

Quoting from *7 Am. Jur.* 2, Attorneys at Law, Section 64 at page 87, we find the following:

> "The proceedings are deemed free of any due process defects, so far as procedure is concerned, if the basic requirements of notice and hearing are met; the form of the notice and hearing is immaterial. (Randall v. Bringham, (U.S. 7 Wall 523) * * *"

Appellant is critical of the "Findings" of the Board of Commissioners. Essentially the Appellant is saying that the facts do not support the Board of Commissioners conclusion which is recited in the decision of the Supreme Court of Ohio in the following language beginning at page 449:

> "The board concluded the respondent used his investigators to solicit professional employment, and that he thereby violated Canons 27 and 28 of the Canons of Professional Ethics adopted by the Supreme Court of Ohio."

Appellant conveniently and for his own purposes sets out only certain portions of said "Findings" and then draws his *own* conclusions therefrom. For example Appellant criticizes the Board's references to the fact that two of the alleged solicitors of legal employment for the Appellant were not called as witnesses by him. Frankly we fail to see how this cursory analysis and critique of the evidence is pertinent here or even related to the substantiality of any Federal question.

Appellant cites the case of *Sterling v. Constantin*, 287 U.S. 387, 77 L. ed. 375, 53 S. Ct. 190, for the proposition that this Court has jurisdiction to examine the evidence on appeal. Our understanding of the present status of the case herein, however, with regard to jurisdiction necessitates a determination as to 1) whether there was a Federal question timely raised and properly framed in the state court proceedings, and 2) whether the Federal question is substantial. The answer is clearly no to both questions. We do not find *Sterling v. Constantin* relevant to either question and note that that case involved regulation to limit a complainant's oil production by executive order of the Texas Governor under the cloak of state constitutional powers. There was no hearing and it was Governor Sterling's contention that the Federal Court had no right to review whether there was in fact a "necessity" underlying said order. This Court upheld the right of the Federal court to make judicial determination as to such necessity.

Question 3

These proceedings were brought by the Columbus Bar Association with respect to violations of the Canons of

Professional Ethics. The gravamen of the charges and proof related to Appellant's employment of one John Meiser for purpose of soliciting professional employment on behalf of Appellant. Appellant, in the phrasing of this third question states that he had no knowledge of the practices of said lay employee. This is clearly not so from the record or the Findings of the Board of Commissioners. Further, that Appellant had discharged said employee after an investigation by the Industrial Commission and before the proceedings in question has no significance with respect to the discipline imposed. This is analogous to saying that an attorney who returns money he has wrongfully taken after some responsible authority makes inquiry should not be subject to a disciplinary proceeding since he has established his rehabilitation. We fail to see that Appellant's comments lend support to his argument as to the substantiality of a Federal question in this regard.

Certainly it should not be necessary to cover in any detail the reasons underlying the prohibition relating to solicitation apart from the simple fact that solicitation *lowers the dignity of the profession and lends itself to* myriad unethical and even criminal practices on the part of attorneys in the handling of cases solicited in order that the attorney might justify representations and promises made to persons solicited with respect to the value and merits of their cases. Review of *7 Am. Jur. 2d*, Attorneys at Law, Sections 40 and 42 reveal that courts all over the country have disbarred or suspended attorneys for the solicitation of professional employment.

In this respect we quote directly from Justice Harlan in *Cohen v. Hurley* (1961), 366 U.S. 117, 6 L. ed. 2d 156, 81 S. Ct. 954, where at page 124 he states:

"It is no less true than trite that lawyers must operate in a three-fold capacity, as self-employed businessmen as it were, as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes. It is certainly not beyond the realm of permissible state concerns to conclude that too much attention to the business of getting clients may be incompatible with a sufficient devotion to duties which a lawyer owes to the court, or that the 'payment of awards to persons bringing in legal business' is inconsistent with the personally disinterested position a lawyer should maintain."

The penalty of indefinite suspension has been approved for solicitation in the workmen's compensation fields in proceedings had under said Amended Rule XXVII. *Cleveland Bar Association v. Fleck* (1961), 172 O.S. 467, 178 N.E. 2d 782, Cert. den. 369 U.S. 861; *Dayton Bar Association v. Herzog* (1962), 173 O.S. 313;

CONCLUSION

The basic questions presented by Appellant relate to amended Rule XXVII of the Rules of Practice of the Supreme Court of Ohio and the application thereof. In this connection we quote branch 3 of the Syllabus at page 17 of *Mahoning County Bar Assn. v. Franko*, 168 O.S. 17, 151 NE 2d 17, Cert. den. 35 U.S. 932 as follows:

> "The Supreme Court of Ohio has inherent jurisdiction over proceedings relating to the disciplining of members of the legal profession of this State, resulting from the Supreme Court's organization as such as well as from its inherent exclusive power of admission, and it may provide by rule both the basis for and the procedure to be followed with reference to such disciplining. (Paragraph one of the syllabus of *In re Thatcher*, 80 Ohio St. 492 and *Cleveland Bar Association v. Pleasant*, 167 Ohio St., 325, approved and followed.)."

Appellant has not presented any Federal question in his jurisdictional statement which was timely or properly raised in the state court proceeding.

Further Appellant has not presented any substantial Federal question. For these reasons the appeal should be dismissed.

Respectfully submitted,

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